United Nations AT/DEC/1205

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1205

Case No. 1282: Alaj et al. Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas at the request of Pranvera Alaj, a staff member of the United Nations (the named Applicant), along with 97 other staff members[1], the President of the Tribunal, with the agreement of the Respondent, successively extended until 30 September and 31 December 2002 the time-limit for the filing of an Application with the Tribunal;

Whereas, on 23 December 2002, the Applicants filed an application containing the following pleas:

[1] A. Ademi, A. Ajeti, B. Alaj, N. Alija, F. Alishani, A. Alo, I. Bajgora, M. Balaj, L. Basholli, S. Beiqi, I. Bejtullahu, M. Beqiri, E. Berisha, L. Berisha, T. Beselica-Berbati, E. Bilibani, L. Bratotini, I. Bytyci, L. Cana, Z. Dauti, A. Dermaku, Z. Duli, A. Dushi, S. Emrullahu, N. Gafuri, B. Gashi, G. Gashi, V. Gaxheri, M. Gjigoli, V. Gjonbalaj, V. Gjuraj, M. Gojani, D. Gorcaj, E. Gota, I. Grubi, A. Hajdini, P. Halili, A. Hasani, D. Hasani, F. Hashani, A. Haxhibrahimi, A. Haxhikadrija, A. Haxhosaj, D. Haxhosaj, A. Hoxha, V. Jaha, M. Kajdomcaj, A. Kastrati, F. Kazazi, F. Kondirolli, G. Krasniqi, H. Krasniqi, S. Krasniqi, Y. Krasniqi, A. Kuci, R. Kullashi, E. Kusari, X. Kusari, B. Laiq, A. Lila, B. Llalloshi, F. Llalloshi, J. Loci, R. Marmullahu, D. Metushi, F. Murati, G. Musa, B. Nahi, A. Nela, L. Nimoni, A. Osmani, K. Feci, V. Peric, P. Pervizaj, A. Pirku, B. Prebreza, V. Qeta, B. Reshtani, A. Rexhepi, B. Rexhepi, D. Rrecaj, M. Sadikovic, A. Sahatqija, A. Salihu, A. Salihu, F. Saraqini, S. Shehu, L. Shkodra, A. Smailovic, Y. Soba, M. Stamenkovic, V. Stavileci, L. Sylaj, L. Tashi, E. Xhema, F. Zeqiri, A. Zhushi.

"**II. Pleas**

Request for Discovery and Witnesses

...

2. The Applicants respectfully request the Tribunal to order the Administration to produce ... information, items, documents or records ...

3. The Applicants request an oral hearing in order to call witnesses ...

Redress sought

4. The Applicants ... request the following redress:

- that the impugned decision, taken on 17 June 1999, to impose a new salary scale in Kosovo be quashed;
- that the original Federal Republic of Yugoslavia (FRY) salary scale be retroactively reintroduced with interest until a comprehensive salary scale has been implemented ...
- ... indemnification of US$ 15,000.00 for legal fees incurred ...
- the award to each of the Applicants of the sum of US$ 50,000.00 as compensation for the moral injury the Applicants have suffered ...
- the award of the sum of US$ 200,000.00 as punitive damages against the [Office of the United Nations High Commissioner for Refugees (UNHCR)] for its ... egregious actions; and,
- such other relief as the Tribunal deems just, fair and equitable ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 April 2003 and periodically thereafter until 18 January 2004;

Whereas, on 19 September 2003, an additional 56 staff members[2] filed an Application for intervention in the case in accordance with article 19 of the Rules of the Tribunal, requesting

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2. M. Jovanovic, F. Bilacaku, J. Vitija, X. Kusari, M. Bazdar, H. Ferri, V. Avdiu, A. Voca, M. Ahma, N. Baliu, B. Beqiri, V. Halili, I. Salihu, I. Hasani, A. Koci, G. Hyseni, B. Dragovic, R. Arlov, L. Neziri, F. Lyta, A. Shkodra, L. Kqiku, A. Aliu, F. Pomaku, B. Shijaku, A. Kurti, M. Cemerikic, Z. Arsic, A. Jedrashi, I. Krasniqi, P. Bilica, B. Susuri, G. Musliu, N. Saliaga, R. Krasniqi, A. Zherka-Hoxha, R. Limani, M. Gjergjizi, K. Plakolli, B. Kelmendi, Sh. Zeqiri, L. Saraci, N. Zymberi, M. Hoxha-Krasniqi, B. Asani, S. Salaji, A. Avdiu, B. Ibishi, B. Orlic, D. Shita, A. Pavic, V. Idrizi, F. Kroqi, U. Muhasheri, E. Kala, S. Calakovic.

"to be joined as Interveners in this action due to their status as employees who have joined the UNHCR Kosovo office after the impugned decision taken on 17 June 1999, by the Director-General of [UNHCR] to retroactively impose a new salary scale upon employees in Kosovo and the effect in law of this illegal decision".

Whereas the Respondent filed his Answer on 18 January 2004;

Whereas the Applicants filed Written Observations on 11 May 2004;

Whereas, on 22 July 2004, the Tribunal decided to postpone consideration of this case until its autumn session and to hold oral proceedings in the case;

Whereas, on 11 November 2004, the Tribunal held an oral hearing during which it requested the Respondent to provide it with a number of documents;

Whereas, on 15 November 2004, the Respondent provided the requested documents;

Whereas the facts in the case are as follows:

On 23 March 1999, in view of the outbreak of hostilities and the NATO bombing campaigns, the UNHCR Office in Kosovo was closed. On 10 June 1999, the Security Council in resolution 1244(1999) authorized the Secretary-General to establish in Kosovo an interim civilian administration led by the United Nations. On the same date, the Security Council adopted resolution S/1999/661, authorizing the Secretary-General with the assistance of relevant international organizations, to establish an international civil presence in Kosovo. Subsequently, the United Nations Interim Administration Mission in Kosovo (UNMIK) was established. In June 1999, a high-level mission was sent to Kosovo by the Office of Human Resources Management (OHRM) to undertake a review of the available salary information from the region, including the FRY, Macedonia and Albania, as well as fresh information from the prevailing conditions in Kosovo. On this basis, a provisional salary scale for locally-recruited staff members was set up.

By telegram dated 16 June 1999 (received on 17 June), OHRM advised UNHCR Headquarters of the approval of a provisional General Service salary scale subject to adjustment upon completion of a comprehensive salary survey of best prevailing conditions of employment in the locality.

On 17 June 1999, OHRM informed the Executive Officer, Office for the Coordination of Humanitarian Affairs (OCHA), of the new salary scale, effective 1 June 1999, payable to locally-recruited staff in the General Service category under the 100 Series appointments, and that the base salary rates and service allowance payable

to General Service staff in Kosovo serving under appointments of limited duration (ALD) had been derived from this provisional scale.

On 22 June 1999, the new salary scale was sent from UNHCR Headquarters to the Kosovo Office, which objected to the scale on 10 July.

On 14 July 1999, UNHCR Headquarters wrote to OHRM regarding the implementation of the provisional salary scale.

On 15 July 1999, the Chief Administrative Officer, UNMIK, Pristina, was advised that an OHRM "Survey Specialist" would arrive shortly to review "the level of mission subsistence allowance (MSA) in the mission area of UNMIK and [to conduct] a survey of best prevailing conditions of employment for the locally-recruited staff in Kosovo". He was asked for his assistance in compiling data for the Survey Specialist.

On 16 July 1999, OHRM provided the Head of Administration, UNMIK, with the provisional General Service salary scale, "pending an on-site review scheduled for 26 July 1999".

On 20 July 1999, OHRM replied to the 14 July letter from UNHCR, advising as follows:

> "All locally-recruited staff of the common system in the General Service category recruited on or after 1 June 1999 shall be paid based on the new Provisional Salary Scale for Kosovo.
>
> Those staff members in the General Service category recruited prior to 1 June 1999 and paid under the Belgrade salary scale shall receive, in addition to the salary based on the Kosovo scale, a personal transitional allowance (PTA) representing the difference between the Belgrade salary scale ... and the Kosovo scale. The PTA should be phased out at the expiration of the staff member's current short term contract."

On 22 July 1999, the above-mentioned clarification was forwarded by UNHCR Headquarters to the UNHCR Kosovo Office. Subsequently, 29 staff members recruited after the opening of the UNHCR Kosovo Office had their contracts changed to take into account the new provisional saary scale.

On 27 July 1999, the Survey Specialist arrived in Kosovo.

On 13 August 1999, the Applicants wrote to the Secretary-General requesting him to review the decision dated 1? June 1999 to change the salary scales for locally-recruited staff members, and perding this review requested a suspension of its application. On 20 August, the Applicants wrote again to the Secretary-General reiterating the request made in their previous letter dated 13 August 1999, and asking for direct submission of the case to he Administrative Tribunal.

By memorandum dated 26 August 1999, the United Nations High Commissioner for Refugees wrote to the Secretary-General expressing her dismay that the United Nations Secretariat had unilaterally decided to reduce, effective 1 June 1999, the local salary scale established for the whole of the FRY and requested him to intervene and take the necessary action he considered appropriate to remedy the situation. On 8 October 1999, the Assistant Secretary-General, OHRM, responded that established procedures had been fully followed.

The Applicants lodged an appeal with the Joint Appeals Board in Geneva on 18 February 2000. The JAB submitted its report on 14 March 2002. Its considerations, conclusions and recommendations read, in part, as follows:

"**Considerations**

...

Salary survey

...

68. While it considers that the Secretary-General has the discretion to set initial levels of pay at a new duty station on the basis of the information available at the time, the Panel noted that in this case the provisional salary scale had first been promulgated 'subject to adjustment on completion of a comprehensive salary survey of best prevailing conditions of employment in the locality'. Therefore, the Secretary-General's discretion in the initial phase notwithstanding, if no such comprehensive survey was carried out, the legality of maintaining the provisional salary scale could be called into question.

69. Having examined the salary survey Manual, the Panel noted, that a central requirement for a comprehensive survey of best prevailing conditions is the establishment of a Local Salary Survey Committee (LSSC), representing the staff and administrations of all United Nations organisations with local employees at the duty station, in order to ensure equitable participation (...).

70. The Panel ... found no evidence that an LSSC was in fact established

...

72. Therefore, although it does not accept the Administration's assertion that a 'comprehensive survey was carried out', the Panel is persuaded that the Administration acted in good faith and that UNHCR staff were involved in the work of the survey specialist, and thus have a certain amount of responsibility for the results.

73. The Panel also noted that other features of salary surveys were adhered to ...

74. The Panel further noted that the outcome of the survey indicated that the provisional scale was in fact higher than prevailing conditions would allow, and that it should have been set lower. In the absence of a properly conducted comprehensive survey, the Panel considered that, notwithstanding the assertions of the Administration, this could only be a provisional assessment, and would need to be verified by a survey involving technically

competent and fully representative bodies. In particular, the absence of an LSSC undermines the credibility of the survey and therefore of the continued use of the provisional salary scale. At the same time, however, the Panel found no evidence that either the local staff or the UNHCR Administration in Kosovo had pressed for another survey to be held promptly to replace the apparently 'flawed' survey.

75. Finally, the fact that the Administration decided to maintain the provisional scale rather than make a downward adjustment, based on the results of the survey tends, in the Panel's opinion, to demonstrate good faith on the part of the Administration.

Retroactivity of the application

...

79. The Panel noted that staff members were notified of a change in their salary status 'effective 1 June 1999' only at the end of July 1999. It was of the opinion, however, that this was an effect, not of the decision, but of its implementation by UNHCR, and that the decision itself did not violate the acquired rights of staff members recruited after 17 June 1999.

Implementation of the decision

...

81. ... The Panel found that UNHCR failed to implement the provisional salary scale in timely fashion in the field.

...

The three categories of appellants

86. The Panel ... reached the following conclusions:

Category A

87. The Panel took into account that 29 locally-recruited staff members had their contracts changed only at the end of July 1999, despite the sending of the telegram to all UN offices and agencies, including UNHCR Headquarters on 16 June 1999.

88. The Panel found that UNHCR made an administrative error by implementing a wrong salary scale although the provisional salary scale had been received as of 17 June 1999. It considered that UNHCR had an obligation to correct this error, that is to say to change the contracts which were based on the wrong salary scale. The Panel found that the correction of this administrative error did not undermine the acquired rights of these 29 appellants, since there is no entitlement to the maintenance of contracts based on a wrong salary scale.

Category B

89. Considering the case of the 20 staff members who were already working for UNHCR before the opening of the UNHCR office, Kosovo, in June 1999, the Panel took note that the instruction promulgating the provisional salary scale provided for them to be awarded a personal transitional allowance (PTA) until expiry of their current contracts, to cover the difference between the Belgrade scale, on which their salaries had previously been based, and the provisional Kosovo scale. Since these staff

members suffered no loss of pay, the Panel considered that their appeal is groundless. Furthermore, the Panel was particularly concerned to discover that, contrary to the instructions, the PTA appears never to have been applied: instead, these staff members were paid directly on the Belgrade scale again - in some cases retroactively - and continue to be paid on the Belgrade scale, despite the fact that their initial contracts expired long ago. In this way the UNHCR office in Kosovo has opened itself to charges of discrimination in applying two salary scales.

Category C

90. As far as the 49 staff members of the category C are concerned, the Panel found that since they all arrived after the opening of the UNHCR Office or started new contracts after having been assigned to other duty stations, there were consequently, and for the reasons given above, no grounds for applying any other salary scale than the one promulgated on 16 June 1999.

Conclusions and Recommendations

91. For the foregoing reasons, the Panel concluded that the detailed examination of the circumstances surrounding the establishment of the provisional salary scale and its application to the locally-recruited staff members in Kosovo did not reveal any violation of the rights of the 98 appellants. It did consider that:

The established procedure, as detailed in the "Manual for Salary Surveys for Non-Headquarters Duty Stations" did not apply to the promulgation of the provisional salary scale and therefore was not violated;

[T]he retroactivity of the decision did not cause any violation of the appellants' rights;

[T]he change in the contract of 20 staff members did not entail any violation of the acquired rights;

[C]ategory B did not suffer any harm and therefore their appeal is groundless;

[T]he appeal of category C is without merit;

92. Accordingly the Panel makes **no recommendation** in support of the present appeal.

..."

In April 2002 and in 2003, comprehensive salary surveys were carried out in Kosovo.

On 22 August 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicants and informed them that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on their appeal.

On 23 December 2002, the Applicants filed the above-referenced Application with the Tribunal.

Whereas the Applicants principal contentions are:

1. The decision to reduce the salary scales of locally-recruited, General Service staff in Kosovo was taken without proper staff consultation and in violation of established procedures.

2. The impugned salary scale reduction was based on an incorrect and arbitrary assessment of Kosovo salaries, and therefore should be considered null and void.

3. The Administration committed breach of contract by cancelling the Applicants' contracts without their consultation and replacing the terms with reduced salary scales.

4. The retroactive effect of the new salary scale violates the acquired rights of staff members and is thus illegal.

Whereas the Respondent's principal contentions are:

1. The Respondent was justified by the events then prevailing in Kosovo in taking the decision of 17 June 1999 to establish a provisional salary scale for United Nations national staff in Kosovo pending an on-site review.

2. The provisional salary scale was confirmed by the on-site review which was conducted in good faith and in all material respects in accordance with established procedures.

3. The provisional salary scale was re-confirmed by a comprehensive salary survey conducted in April 2002 fully in accordance with the Manual for Salary Surveys for Non-Headquarters Duty Stations.

4. The introduction of the provisional salary scale did not breach the contractual or acquired rights of the United Nations national staff in Kosovo.

5. There are no exceptional circumstances that would warrant awarding costs to the Applicants.

The Tribunal, having deliberated from 30 June to 23 July 2004 in Geneva and from 27 October to 24 November 2004 in New York, now pronounces the following Judgement:

I. The Tribunal shall address, first, two preliminary issues. The Applicants have requested production of a large number of documents. Had the Applicants requested a reasonable number of documents of particular and individual interest, the Tribunal might have granted the request. As it is, however, the Tribunal is not prepared to order

the blanket release of what appears to be all documentation even remotely related to the matter for the Applicants' perusal just in case one or more of these documents might be useful to them. The Tribunal, for its part, is satisfied that it has sufficient documentation before it to render judgement.

The other question concerns the Application for intervention made by fifty-six staff members claiming to be in a position similar to that of the Applicants. As it advances similar contentions to that of the Applicants, the Tribunal has decided to admit the Application for intervention.

II. The Applicants attack the "unilateral decision to reduce the national staff salary scales of locally-recruited Kosovo staff members" which was applied with retroactive effect. Such decision, they claim, was taken "without staff consultation and without following proper salary survey procedures". It was apparently communicated to the Applicants on different dates in late July 1999 via their respective monthly "Statement of Earnings and Deductions" and "despite requests, the Administration failed to explain how it calculated and established the new salary scales".

III. The Tribunal considers that the three surveys undertaken by the Administration, namely the provisional one undertaken just prior to 17 June, the July 1999 salary survey conducted by the Survey Specialist and the survey of 2002 must be considered jointly, as from a legal viewpoint the three of them are intimately related.

The Tribunal will first address the issue of the so-called "unilateralism" of the decision to undertake a survey with a view to a new salary scale. The Tribunal is satisfied that the Administration does not need, legally speaking, to consult the staff about a decision to conduct a survey in order to ratify or modify an existing salary scale. After all, it is the Administration who pays the staff members their salary and it stands to reason that it takes stock, from time to time, of what the salary situation is in the local market to compare it to the salaries paid to locally contracted staff members. Properly conducted surveys tend to adjust the level of salaries to "the best prevailing conditions" of the market, and the Administration is therefore amply justified in verifying, from time to time, if that premise is complied with in the different localities where United Nations bodies or programmes are active. In the particular case of UNMIK, it was totally reasonable that the Administration would seek to verify the conditions prevailing in a zone that had suffered a veritable man-made cataclysm, a zone where a vast new United Nations presence was to be established (the new mission would comprise, as explained by the Respondent "four component pillars including the

United Nations-led Civil Administration, UNHCR-led Humanitarian Affairs, European Union-led Reconstruction and Organization for Security and Cooperation in Europe-led Institution Building"). Moreover, the conditions prevailing in that zone in the aftermath of a civil war might very well be quite different from those existing in Belgrade.

The Tribunal considers that "consultation" with the staff must not be confounded with staff "participation", the latter being normally required for surveys like those at issue now, both under the United Nations Common System Manual for Salary Surveys in Non-Headquarters Duty Stations (the Manual) as well as under the criteria set out by the International Civil Service Commission (ICSC). Thus, the Tribunal must address whether or not there was proper staff participation in the surveys.

IV. The question of staff participation in the surveys is, in its turn, part of a wider issue, namely whether the terms stipulated in the above-mentioned Manual must be rigorously applied or whether they allow for certain flexibility in exceptional circumstances, such as the establishment of UNMIK. The Tribunal is satisfied that, in the present case, a flexible approach was justified for two reasons, namely the essentially provisional nature of the first salary scale and the decidedly exceptional circumstances of the establishment of a new mission in Kosovo, namely the "interim civilian administration" as decided by Security Council resolution 1244. This is borne out by the language contained in paragraph 9 of ICSC/45/R.15/Rev.1 dated 5 January 1998 entitled "Remuneration of the General Service and related categories: general methodology for surveys for best prevailing conditions at non-headquarters duty stations":

> "Notwithstanding the degree of flexibility provided for in the methodology, it is impossible to legislate for all conceivable conditions. By the very nature of the diversity of countries involved, there must be some exceptions, owing ... to ... the need to react to specific local conditions. Special measures may, therefore, be required in some instances. ..."

V. If the three surveys must be considered part of the same process, the first two are decidedly complementary, and the Tribunal is satisfied that by undertaking the second one the Administration showed that it was acting in good faith. The first survey was done on the spur of the moment. A high-level delegation was sent to Pristina on an urgent basis, as the UNMIK office was to be established within a very short time-

span. The review of the prevailing conditions as well as the actual setting up of a provisional salary scale were entrusted to the experience of the then Director of Administration, UNOG. His assessment, however, seems to have been rather generous, as it emerged from the salary survey exercise conducted by the Survey Specialist in July 1999 that the provisional salaries were on average 12.1 per cent higher than the salaries of comparable local employers. The comprehensive survey of 2002 determined that the salary scale was even higher: 14.3 per cent higher than the salaries of the comparator entities. In this regard, the Tribunal notes that only international organizations were retained (five of them: USAID, Save the Children, Mercy Corps, Doctors of the World and CARE) for the second survey as few, if any, large employers comparable with UNMIK existed in the area at that time.

VI. Be that as it may, the important point for the Tribunal is that the shortcomings of the first provisional survey were mostly corrected by the second. The Applicants are decidedly mistaken that the Survey Specialist was not sent to Kosovo "to do a salary survey", as indicated in the "Note for the file" signed by the Chairman of the Staff Council on 30 July 1999. Indeed, the record shows that on 15 July 1999, the Survey Specialist advised the Chief Administrative Officer, UNMIK, that

> "the purpose of my upcoming mission to UNMIK will be to review the level of mission subsistence allowance (MSA) in the mission area of UNMIK *and to conduct a survey of best prevailing conditions of employment for the locally recruited staff in Kosovo*". (Emphasis added.)

He worked diligently in this regard and it is clear from the same 30 July "Note to the file" that the Chief of Staff, UNMIK - the above-mentioned Director of Administration, UNOG, - welcomed the participation in the survey works of "two experienced UNHCR national staff, a G-6 Field Assistant (...) and a G-6 [Administrative] Assistant (...)". In fact, one of them accompanied the Survey Specialist to his interviews with three would-be comparators and then had a long working session with him, of about five hours, in which they evaluated the data received from the comparators and entered them in a computer in order to calculate the salary scale to be applied. It appears that the other staff member who had the opportunity to participate failed to avail himself of that opportunity.

VII. Both the June 1999 and the July 1999 salary exercises show that the Administration tried to follow the Manual as closely as possible. Admittedly, the

participation of the staff was not channelled through an LSSC, and the Tribunal finds that the JAB correctly pointed out that it was necessary to confirm the results with another salary survey conducted in accordance with the requirements of the Manual, such as the participation of the staff through an LSSC. This was done in 2002.

However, the Applicants also attack the 2002 survey, mainly on the ground that only four comparators were retained, instead of the five suggested by the Manual. The Tribunal notes the Respondent's allegations - and the Tribunal is inclined to believe him - that only four of the six entities listed responded to the criteria required for a comparator, and that therefore only four could be retained. The Tribunal finds this argument satisfactory, taking into account the conditions in Kosovo. In any case, the Respondent has stated, and was not contradicted, that "the average of all six comparators was 7 [per cent] lower than the [United Nations] salaries".

The Tribunal is of the view that the rules governing the surveys cannot always be applied as rigorously as suggested by the Applicants, since comparators are seldom comparable to the United Nations. As the Tribunal held in Judgement No. 1100, *Hasanat Schmoeltzer et al.* (2003), the Flemming principle is not an end in itself, but only a means of fulfilling an objective expressed by Article 101.3 of the Charter:

> "the recommendations of the Flemming Committee are subject to and must be seen in the context of the provisions of Article 101.3 of the Charter, which establishes as *paramount consideration* 'securing the highest standards of efficiency, competence and integrity' both in the local recruitment of staff and in the 'determination of the conditions of service'. That is the real objective of Article 101.3 of the Charter: securing the highest standards of efficiency, competence and integrity of United Nations staff. This is what the Organization must accomplish and to that end, the Organization must apply the mechanism recommended by the Flemming Committee."

The Tribunal held in the same case: "Being competitive, then, is the way suggested in order to obtain staff among the best in the local labour market".

Obviously, UNMIK is competitive in the local labour market. According to the declaration of one of the intervening parties in the oral hearing of 11 November 2004, no one resigned because of the new salary scale, nor did any of the staff who were paid according to the Belgrade scale until termination of their original contracts refuse to sign the new contracts with the lower salary scale.

VIII. The Applicants' argument is two-fold. They attack the validity of the Kosovo scale because of procedural defects and maintain that the Belgrade scale should have

continued to apply. According to them, because the June 1999 survey was defective, and because the July 1999 one was improperly conducted, both surveys were null and void: thus, the Belgrade scale was the one to be applied. This reasoning fails on several grounds. It fails logically, because in the Tribunal's view, the 2002 survey confirms the results of the two earlier ones. Had the latter survey, which followed the provisions of the Manual, shown a different result, say a level of conditions - not only of salaries, but of conditions of employment - of UNMIK which was not among the best prevailing in the market, then the Applicants might have shown some prejudice.

Moreover, and this is important, the staff did not request that a new survey be conducted, which is what they should have done. If the Applicants felt that the June/July surveys were defective, they should not have tried to force the Administration to maintain the Belgrade scale, but they should have insisted that a new survey be conducted with the participation of an LSSC; this is what the Administration did in 2002. Even admitting, by way of hypothesis, that the procedure applied in June 1999 was defective, and ignoring the difficult circumstances making the strict application of the Manual difficult, if not impossible, the legal consequence could not have been an obligation of the Administration to apply the Belgrade scale forever after, but to conduct a new survey with all the guarantees of the Manual.

In addition, not only were the 1999 scales confirmed by the 2002 survey, but a new survey conducted in 2003 added further confirmation of their salary levels. Finally, while it may be true that the Administration could have ordered the new survey sooner than it did, it is also true that the subsequent confirmation of the soundness of the original provisional salary scale cures all defects. It proves that no prejudice was suffered by the staff on account of the delay, since had the final survey been conducted sooner, it would not have altered the outcome.

IX. The Applicants also contend that the Administration erroneously applied the provisional June scale retroactive as of 1 June 1999. It was explained to the Tribunal, in the oral hearing, that such is the practice followed by the Administration for budgetary reasons. However, the Tribunal feels that the provisional scale could not have been in vigour before the actual adoption of the resolution creating the office in Pristina, for the simple reason that, at that moment, there was another applicable scale, namely that of Belgrade, which was thirty per cent higher than the other one. The Tribunal finds that the new scale should have started to be applied from the moment when it was promulgated, i.e., 17 June 1999. At the same time, the Tribunal finds that

the issue of retroactivity was moot, as no contracts were signed by any of the Applicants prior to 17 June.

Thus, those staff members whose contracts were entered into before that date should be paid under the Belgrade scale - or under the Kosovo scale plus a PTA to compensate for the difference - until the date of termination of their contract. Those with contracts entered into after that date, 17 June, should be paid according to the Kosovo salary scale: if they were paid at the Belgrade scale, this was a mistake that the Administration was fully justified to correct, as it did. (See Judgement No. 1195, *Newton* (2004).)

X. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1206

Administrative Tribunal

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1206

Case No. 1292: SCOTT Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis,

Whereas at the request of Kenneth Scott, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 January 2003 and once thereafter until 31 March 2003;

Whereas, on 31 March 2003, the Applicant filed an Application requesting the Tribunal, inter alia:

> "11. On the merits, ... ***to find***:
>
> a. that the Respondent failed to follow and apply correctly the 'Standard of Recruitment and Grading for the Professional and Higher Categories' [(the Grading Standard)] dated 21 November 1994, in placing the Applicant at step [VI];
>
> b. that in placing the Applicant at step [VI], the Respondent applied an alleged 'rule' that the maximum step that could be assigned to the Applicant was step [VI];
>
> c. that the Respondent falsely and by false pretence claimed to apply a 'rule' that did not in fact exist and which was contrary to written [United Nations] policy;
>
> d. that the Respondent abused his discretion and acted arbitrarily and unjustly toward the Applicant, and contrary to good administrative practice, and denied the Applicant due process; and

e. that the Applicant was injured and denied due process by unreasonable delay in the ... proceedings ...

...

12. Wherefore, ... ***to order***:

a. that the Applicant's step be amended to step [X], retroactive to 1 January 1998 ... and that he be compensated accordingly;

b. that the Applicant be awarded compensation for unreasonable delay in the ... proceedings ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 August 2003 and periodically thereafter until 30 November;

Whereas the Respondent filed his Answer on 24 November 2003;

Whereas the Applicant filed Written Observations on 10 February 2004;

Whereas the Applicant filed a "Supplemental Submission" on 14 October 2004;

Whereas, on 26 October 2004, the Tribunal asked the Respondent whether he would be willing to undertake "an independent re-evaluation as to the appropriate entry level" for the Applicant within a specified period and, on 1 November, the Respondent indicated his willingness to undertake such a review;

Whereas, on 4 November 2004, the Applicant submitted comments with regard to the "independent re-evaluation";

Whereas, on 19 November 2004, the Respondent submitted the results of the "independent re-evaluation";

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"***Employment History***

... [The Applicant] was recruited effective 1 January 1998, as a Legal Officer with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Hague, at the P-4 level, step VI. His initial fixed-term appointment [was subsequently extended].

Summary of the facts

[According to the Applicant, upon recruitment he was advised by the Human Resources Section that he had been given "the highest possible or maximum step - step [VI]".]

... In memoranda of 10 November and 14 December 1998 addressed to the ICTY Administration, [the Applicant] requested that he be granted additional steps at the P-4 level. [On 11 November 1998, the Chief, Human

Resources Section, ICTY, responded to the first of these memoranda, indicating that the Applicant had "been granted the maximum steps allowable at that level as set out in the [Grading Standard]. On 29 January 1999, the Deputy Prosecutor, ICTY, asked that 'urgent consideration' be given to the Applicant's request as he 'seem[ed] to make a good case for an interpretation of the appropriate rules which would justify his classification' at the P-4, step X, level.] [The] Chief, Human Resources Section, ICTY, [again] replied [to the Applicant] on 4 February 1999, stating, *inter alia*,

> 'At the time of recruitment staff may receive a higher step than step [I], which is the customary level for the majority of newly recruited staff, based on the personal qualifications of the staff member. Step [VI] is considered the maximum step for new recruits. The appropriate step is determined by the Human Resources Section based on prevailing practice and guidelines applied throughout the United Nations common system. Step [VI], as was granted in your case, already reflects that your accomplishments and experience were duly considered.'

[The Applicant's] request for a higher step was, therefore, refused.

... On 31 March 1999, [the Applicant] addressed a letter to the Secretary-General requesting an administrative review of this decision and putting forth his case for justifying the granting of step X.

... In the absence of a substantive reply to his letter, [on 7 July 1999, the Applicant lodged an appeal with the JAB in New York]."

The JAB adopted its report on 17 January 2002. Its considerations, decision and recommendation read, in part, as follows:

"***Considerations***

12. The Panel was aware that the matter under appeal lies within the discretionary authority of the Secretary-General and that, in any event, the Panel itself was not qualified to make a determination - or a recommendation - concerning the appropriate step for Appellant on recruitment. ...

13. The Panel recalled that staff rule 111.2 makes provisions for review of an administrative decision, upon receipt of a request from the staff member concerned. The Panel recognized the potential value to the Organization of that procedure: if the Appellant were satisfied with the results of that review, as reported to him, the Organization would be saved the expense of an appeal and, perhaps, of further proceedings. The Panel noted that in this case two individuals were granted higher steps than step [VI], indicating that the grading standards may not have been uniformly applied. The Panel also noted that the incorporation of the administrative review in the Staff Rule constitutes an implicit recognition that officials may, on occasion, err in the exercise of the discretionary authority delegated to them.

14. The Panel wishes to make it clear that it has come to no conclusion as to the correctness of [the] decision [of the Chief, Human Resources Section, ICTY]. What concerned the Panel was the tacit decision by the Administration not to subject that decision to an administrative review ...

Decision and Recommendation

15. The Panel decided unanimously to recommend to the Secretary-General that the decision to place Appellant on step VI of grade P-4 be reviewed at a sufficiently senior level to assure him that his due process rights have been respected.

16. While the Panel has no further recommendation to make with respect to this appeal, it would urge the Administration, for the reasons touched on in paragraph 13 above, to resort more frequently to the administrative review procedure."

On 16 August 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General accepted the Board's conclusion and its unanimous recommendation, and had "decided that the Registrar of ... ICTY, who was not involved in the initial decision, [would] review [the Applicant's entry level] to ascertain its correctness".

By memorandum dated 13 September 2002, the Registrar of ICTY indicated that he had reviewed the Applicant's recruitment level pursuant to the recommendation of the JAB and had determined that the step at which the Applicant was recruited "was in full compliance" with the Grading Standard. He thus concurred with the original decision to place the Applicant at the P-4, step VI level. Thereafter, on 23 January 2003, the Registrar again wrote to the Applicant, referring to a recent meeting between them, and stating, inter alia:

> "The fact that, in the past, there were two persons to whom you referred who were granted higher initial steps than you were, does not warrant your conclusion that the Organization did not comply with its own procedures in your particular case".

On 31 March 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The quantity and quality of the Applicant's training, experience and qualifications are such that he should have been placed at step X at the time of his initial employment.

2. In improperly, and inconsistently, implementing the Grading Standard, ICTY acted arbitrarily towards the Applicant, violating his rights of due process.

3. The review performed by ICTY pursuant to the Secretary-General's decision of 16 August 2002 was neither meaningful nor substantive, but a *pro forma* exercise.

Whereas the Respondent's principal contentions are:

1. The decision to place the Applicant at the step VI level was based on established policy applied throughout the entire United Nations system.

2. The Applicant's request for correction of entry level was duly considered in the course of the September 2002 review.

3. The Applicant has not substantiated his complaint that he was treated unjustly nor has he demonstrated that he was injured by the alleged administrative delays.

The Tribunal, having deliberated from 28 October to 24 November 2004, now pronounces the following Judgement:

I. One could readily understand the ire and justifiable sense of grievance of a staff member who could establish that he had been induced into accepting an appointment with ICTY at the P-4, step VI level, by a false misrepresentation that that was the highest level at which he could be recruited, and that the Administration was precluded by rules from taking him on at a higher step but that they would have done so had they not been constrained by the rules in question.

The Applicant's case is somewhat different. He was offered a position as Legal Officer at the P-4, step VI level, which he duly accepted, and commenced duty on 1 January 1998. Post-recruitment, having learned that two of his colleagues had been allocated step X upon recruitment, he sought to have his entry level adjusted. He was repeatedly informed that he had been given the highest possible, or maximum, step available so it is natural that he must have suffered an understandable sense of grievance and a belief that he was being unfairly treated as he knew this could not have been the case.

When he wrote to the Human Resources Section in November and December 1998, the Applicant was seeking a review of his grading and seeking that his step be increased from step VI to step X based on his contention that his pre-recruitment experience as a trial lawyer had not been properly measured or assessed and that, on his interpretation of the Grading Standard, he felt he should have been recruited at the higher step. He did not then make the case that he had received any false or misleading representation which had induced him into taking up his appointment on the terms which had been offered, or that he had been then misled.

II. The Applicant cites examples of what he says were untenable or false reasons advanced on behalf of the Administration in seeking to suggest that he could not have been recruited at a higher step. He cites reasons offered to him well after he had commenced his employment and raised the issue as to how the step allocated to him (step VI) had been arrived at, again not making a case that he had accepted the appointment as a result of having been misled about any rules.

Because of the tight confines of the issues in the case and the relatively narrow issues which the Tribunal should address, it is not really essential for the Tribunal to adjudicate upon the proposition advanced by the Applicant that, upon the proper construction of the Grading Standard, he *might* or *could* have been recruited at the higher step. This is so because the Applicant cannot establish that he had any right to have been recruited at the higher step, or establish any right to have his step adjusted upwards, and that any such *right* has been denied. He essentially brings his case on a claim that the ICTY Administration falsely misrepresented to him that the Grading Standard had placed a ceiling on the step allocated to him; that the Administration knowingly misrepresented the terms of the Grading Standard or, alternatively, that they had misconstrued its terms; that they had failed to apply the proper interpretation of the Grading Standard when they evaluated the step to be awarded; and, that on a proper application of its terms, he should have been allocated a higher step. He claims that step X was the appropriate step at which he should have been recruited and that, as a direct consequence of the Administration's fraud or error, he suffered financial loss.

III. The Tribunal should say that it finds that the wording used by the Administration from time to time in answer to the Applicant's contention that he should have been recruited at step X rather than step VI (had his pre-recruitment experience been properly evaluated) to be misleading and unfortunate. The Applicant was advised variously that he had been granted "the highest possible or maximum step - step [VI]"; that "step [VI] is considered the maximum step for new recruits"; and, that the Administration had granted the Applicant "the maximum steps" within the level. These statements clearly sought to indicate that a Staff Rule had imposed this ceiling which was not the case. The justification or answer offered ought to have been that the step VI level, being the entry level upon which the appointment had been offered and upon which it was accepted, had been fixed by the Administration in the exercise of its discretion in relation to the evaluation of the value of the Applicant's pre-recruitment experience or for such other legitimate reasons as might have been invoked. Under the Grading Standard, it is clear that the work experience of a

candidate is to be considered more favourably if the candidate has enjoyed progressive responsibilities and more diversified experience with the passage of time than would be the case had his experience been of a more static or repetitive nature. It was for the Administration to make a subjective assessment as to the quality and relevance of the Applicant's pre-recruitment experience as, under the terms of the Grading Standard, it was not to be assessed merely on the basis of time served. There are clearly many subjective evaluations to be made by the Administration in its evaluation of an applicant and, indeed, in determining the terms of any appointment which they might choose to offer the candidate selected to fill the post.

The Applicant failed to demonstrate to the JAB that the Administration had breached any of the guidelines set out in the Grading Standard but, because of the panel's concerns in the case, it recommended that the decision to grant the Applicant step VI be reviewed at a sufficiently senior level to assure him that his rights of due process had been respected. It was fully cognizant of the fact that the JAB itself was not qualified to carry out this self-same exercise and that it was not appropriate for it to substitute its own subjective assessment of the Applicant's qualifications for the discretion of those officials ordinarily charged with making such assessments and decisions.

The Secretary-General accepted the JAB's said recommendation and, in due course, a review of the said assessment was conducted by the Registrar of ICTY who had not been concerned with, or involved in, the original exercise whereby the Applicant's recruitment step had been initially evaluated. The Applicant, however, takes exception both to the nature of the review and to the manner in which it was conducted. The Registrar concluded that the initial evaluation of the Applicant's step had been properly carried out and that the evaluation at step VI was appropriate. Whilst the Tribunal does not wish to cast any aspersion on the honesty or integrity of the Registrar, he was, nonetheless, a person who would be viewed as a member of the ICTY Administration. Accordingly, he may have shared what appears to have been the said Administration's erroneous view that the Grading Standard somehow placed a ceiling on the step at which the Applicant could have been recruited, or may have been influenced by the interpretation of the Grading Standard or the perception of appropriate practice as was held by ICTY which is set out and quoted in paragraph III above. Clearly, the Applicant harbours the view that the said review could not be considered as properly independent and he has no confidence in its findings.

Since the express intent of the JAB's recommendation was that a review should take place which would make an objective assessment and, regardless of its

outcome, provide reassurance to the Applicant, and since the Tribunal finds it understandable that he genuinely perceived that the review undertaken was neither objective nor impartial, the Tribunal asked the Respondent whether he was willing to conduct a fully independent review of the step-in-grade to which the Applicant was entitled upon his recruitment. This review was conducted by two Senior Human Resources Officers in the Operational Services Division of the Office of Human Resources Management (OHRM) at Headquarters, a unit untainted by any of the above-referenced concerns. On 19 November 2004, the Respondent advised that, based on the information provided by ICTY - namely the Applicant's Personal History form, his curriculum vitae and the post description - "the appropriate level was P-4/VI upon initial appointment". The Tribunal is content that this review was objective and impartial, and that the Officers had before them the documentation necessary to complete their task.

Accordingly, notwithstanding the erroneous misstatements given by ICTY regarding the content of the Grading Standard, the Tribunal is satisfied that the Applicant was granted the correct step upon his entry into service and that any lingering doubts he may have - justifiably - harboured should now be laid to rest. Nonetheless, the misstatements as to the content of the Grading Standard clearly resulted in the Applicant honestly believing that he had not been treated fairly and that the step allocated to him on entry into service was too low, and this resulted in what for him must have been long, protracted and distressing proceedings. For this, he is entitled to compensation.

IV. The Applicant lodged his Appeal with the JAB on 7 July 1999. It took until 4 October 2000 for the Respondent to file his reply. The JAB Report was not issued until 17 January 2002 and it was not until January 2003 that the Applicant was told that the "review" recommended by the JAB had been carried out. These delays do little to inspire confidence in the Organization's system of administration of justice - or for the reputation of that system - but they are all too commonplace. Whilst the Tribunal deplores the repetitive delays and the pace at which the system moves, there is nothing unusual about such delays at all. Since the Tribunal has decided that the claims made by the Applicant that he be compensated in relation to his recruitment level should be rejected, it is difficult to justify an award of compensation for the delays he endured in relation to the progress of his case. This is particularly so as such delays are commonplace and do not usually attract any award of compensation, even where a case succeeds on its merits.

V. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of US$ 5000 for the misrepresentations made as to the content of the Grading Standard; and,

2. Rejects all other pleas.

(*Signatures*)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1207

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1207

Cases No. 1293: DI FILIPPO (1)
No. 1294: DI FILIPPO (2)

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Mr. Dayendra Sena Wijewardane;

Whereas, on 14 April 2003, Pasquale Di Filippo, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application in the "first case" containing pleas which read as follows:

"**II. Pleas**

...

8. On the merits, the Applicant respectfully requests the [Tribunal] to find that:

8.1 The Respondent removed the Applicant from office for reasons extraneous to merit, competence, and professional appraisal;

8.2 The Respondent did not release the salary of the Applicant in violation of all relevant [United Nations] Staff Rules and Regulations ...;

...

9. Whereafter the Applicant most respectfully requests the [Tribunal] to order the Respondent:

Obligations

9.1 The ... production of [documents] ...;

9.2 The withdrawal of all unfounded ... charges ...;

9.3 The rescinding of the administrative decision notified in writing to the Applicant on [13 January 2000] ...;

9.4 *Retroactive and Withheld Pay*

The release of the full salary of the Applicant, with retroactive effect for a third year [with interest] ...;

9.5 *Monetary Compensation*

The payment of ... monetary compensation ...;

9.6 *Alternative Monetary Compensation(s)*

...

9.6.1 The payment of a lumpsum of US$ 100,000.00 ...

9.6.2 The payment of ... monetary compensation equalling a thirty (30)-month net base salary of the Applicant ...

9.7 *Referrals*

...

[Referral of named staff members to the Joint Disciplinary Committee.]"

Whereas, on 15 April 2003, the Applicant filed an Application in the "second case" containing pleas which read as follows:

"II. **Pleas**

...

8. On the merits, the Applicant respectfully requests the [Tribunal] to find that:

The Respondent paid the Applicant a Relocation grant - Replacement of shipment entitlement applicable to Junior Professional Officers (... JPO) i.e. with a lumpsum payment of US$ 7,200 vs. a requested, expected and legitimate Relocation grant - Replacement of shipment entitlement (... Relocation grant) with a lumpsum payment of US$ 12,000 applicable to single staff.

9. ... [The Tribunal is] respectfully requested to order the Respondent:

Obligation

9.1 [The production of documents;]

Withheld Entitlements

9.2 The payment of the balance of the Relocation grant in the amount of US$ 4,800.00 ... [with] interest ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer in the "first case" until 30 September 2003 and twice thereafter until 15 December;

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer in the "second case" until 30 September 2003 and periodically thereafter until 26 December;

Whereas the Respondent filed his Answer in the "first case" on 5 December 2003;

Whereas the Respondent filed his Answer in the "second case" on 15 December 2003;

Whereas the Applicant filed Written Observations in the "first case" on 29 December 2003;

Whereas the Applicant filed Written Observations in the "second case" on 17 January 2004;

Whereas the Applicant submitted additional communications in the "first case" on 5 June and 8 October 2004;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) in the "first case" reads, in part, as follows:

"*Employment History*

... The [Applicant] joined [the United Nations Office for Project Services (UNOPS)] as a ... JPO, for an initial one-year contract effective 5 November 1997 and subsequently renewed for an additional year, from 5 November 1998 to 4 November 1999. The [Applicant] received a final extension of his contract ... to 4 February 2000.

Summary of the facts

... On 17 July 1999, ... the [Applicant's] supervisor, ... through an e-mail made a request to [the] Chief, Division for Africa, UNOPS, for a third year contract for the [Applicant] under the Italian JPO programme.

... On 10 August 1999, ... [the Chief, Division for Africa, responded] ... that due to space constraint she had some reservations concerning such an extension.

... On 13 January 2000, ... UNOPS addressed a letter to [the Applicant] confirming that his fixed-term appointment [had] been extended for a period of 3 months, i.e. 5 November 1999 through 4 February 2000. ...

... On 10 March 2000, [the Regional Coordinator, Global Environment Facility, Europe & the CIS, UNDP,] wrote to [the] ... Permanent Mission of Italy to the United Nations, requesting the Government of Italy to consider an extension of [the Applicant's] assignment under the [JPO] Programme. ...

... On 25 April 2000, ... the Permanent Mission of Italy to the United Nations responded ... that the Italian authority [had] agreed, on an exceptional basis, to extend [the Applicant's] contract for a third year with ... UNDP.

... On 1 June 2000, ... UNDP ... informed [the Permanent Mission of Italy] as follows:

> 'Currently, UNDP Headquarters is undergoing a downsizing exercise, as part of its budget strategy and towards achieving a leaner headquarters. As part of this exercise, the Regional Bureau for Europe and CIS (RBEC), which had initially requested [the Applicant's] services, was required to undertake a functional analysis of its staffing requirements. The functional analysis has shown that the services of a JPO with [the Applicant's] competencies are not needed in RBEC at this time. Given the general circumstances surrounding the re-structuring of headquarters, I am afraid that we are not able to take advantage of [the Applicant's] service at this time and are proceeding with his separation formalities effective as of 4 February 2000.'

[On 16 August 2000, the Applicant requested the Secretary-General to review the administrative decision contained in the letter dated 13 January from UNOPS.]

... On 30 August 2000, the [Applicant] was informed ... that his request for administrative review submitted to the Secretary-General was time-barred because it was introduced beyond the two-month time-limit requirement, starting on the date of notification of the decision in writing.

... On 5 September 2000, the [Applicant] replied ... as follows:

> '... a review of two (2) distinct and separate administrative decisions was requested. Namely, i) the administrative decision conveyed to me on 13 January 2000, and ii) the failure by UNDP to renew my contract and release salary as per UNDP's own request and subsequent agreement by the Government of Italy. These administrative decisions were taken by UNOPS and UNDP respectively.'

The [Applicant] also indicated that UNDP's response did not address his request for review of the second administrative decision mentioned above. The [Applicant] finally requested the complete review of the two distinct and separate administrative decisions."

On 12 September 2000, the Applicant lodged an appeal in the "first case" with the JAB in New York.

The JAB adopted its report in the "first case" on 5 March 2003. Its considerations, conclusions and recommendation read, in part, as follows:

> ***"Considerations***
>
> ...
>
> 26. ... The Panel, given the exceptional circumstances of the case, decided in accordance with staff rule 111.2 (f) to waive the time limits for the filing of the request for review, thus deem the appeal receivable.
>
> ...
>
> 29. ... The Panel took note that according to UNDP'S JPO guidelines policies, the extension of a JPO for a third year was to be initiated at least six months before the expiration date of the current contract. As such, by mid 1999, the Appellant should have been informed of any intention or initiative on the part of the Administration to extend his contract for a third year. The Panel noted that the Appellant failed to provide such evidence, therefore, there was no basis for the Appellant to expect that his contract would be renewed for a third year. ...
>
> ...
>
> 31. ... Based on the information received, the Panel felt that it was difficult to establish the link between the removal of the Appellant ... and the subsequent recruitment of [another JPO whom the Applicant claimed was the reason for the non-renewal of his contract].
>
> 32. ... The Panel took note that according to the Respondent, in March 1999, when being transferred to the Africa Division, the Appellant was informed that 'given the impending decentralization of the portfolio of the Division for Africa to the field ...there would be no continuing demand for his services beyond the expiration date of his JPO assignment'. The Respondent added that he had also informed the Appellant that due to lack of space, it would not be possible to accommodate him at the new office premises in March 1999 ... The Panel thus observed that the Administration properly informed the Appellant that his contract would not be renewed. In fact the Panel was of the view that the Administration acted in good faith when it granted the Appellant a three-month extension ...
>
> 33. The Panel took note that the Appellant's performance appraisal report (PAR) for 1999 was not favourable, but the PAR for 2000 had more positive comments on the Appellant's performance, demonstrating that it was not an issue. As a general comment, the Panel found unrealistic the Appellant's theory of conspiracy ...
>
> ***Conclusions***
>
> 34. In light of the foregoing, the Panel unanimously agreed that the Appellant failed to corroborate his allegations that the Administration had created an expectation for a third year contract under the JPO programme, and also that there was a conspiracy to remove him in order to recruit someone else for the exchange of favours.

35. The Panel *unanimously concluded* that the Appellant's allegations were not realistic.

Recommendation

36. The Panel thus *unanimously decided* to make no recommendation in support of this appeal."

On 14 April 2003, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB in the "first case", filed the above-referenced Application with the Tribunal.

On 29 July 2003, the Under-Secretary-General for Management informed the Applicant that the Secretary-General agreed with the JAB's conclusions in the "first case" and had decided to accept its unanimous recommendation and to take no further action on his appeal.

Whereas the additional facts pertaining to the "second case", as contained in the report of the JAB in the "second case", read as follows:

"... On 23 August 2001, the [Applicant] submitted to [the Office of Human Resources, UNDP, (OHR)], a request for payment of his relocation grant in the amount of US$ 12,000, in lieu of his shipment entitlement in connection with his repatriation to Italy upon completion of service.

... On 28 August 2001, [OHR] informed the [Applicant] that he was only entitled to a total lump sum of US$ 7,200 in connection with his separation from service.

... On 28 September 2001, the [Applicant] wrote an e-mail to [OHR] requesting ... review [of] the decision to grant him only US$ 7,200, in lieu of US$ 12,000, based on the fact that he was no longer a JPO, but rather a single staff member as his three-month extension had been charged to the UNOPS administrative budget.

... On the same date, [OHR] responded to the [Applicant's] e-mail as follows:

> 'At the time of the expiration of your contract, UNOPS was organizing a training workshop in Africa and in order to give you the opportunity to participate, enabling you to accumulate further knowledge and experience, UNOPS offered you a temporary three-month contract from 5 November 1999 to 4 February 2000 to be charged to the UNOPS administrative budget. As a result of the extension of your appointment by three months, the JPO Unit agreed to defer your separation entitlements until the actual date of separation. Since your separation entitlements were governed by the agreement between UNDP and the Italian Government, we are unable to exceed these entitlements.

> In view of the above, regretfully we are unable to agree to your request for the $12,000 lump sum relocation grant.'"

On 1 October 2001, the Applicant lodged an appeal in the "second case" with the JAB in New York. The JAB adopted its report in the "second case" on 12 March 2003. Its considerations, conclusions and recommendations read, in part, as follows:

> "***Considerations***
>
> 14. The issue before the panel was to determine whether or not the Appellant's contractual status changed from JPO to regular fixed-term appointee, when he was granted a three-month extension charged to [the] UNOPS budget. If such was the case, did it entitle him to a relocation grant of US$ 12,000 as opposed to US$ 7,200, which he received and thereafter challenged.
>
> ...
>
> 16. The Panel thus examined the Appellant's letters of appointment. ... The Panel observed that in his first two letters of appointment, the Appellant was given a 200 series fixed-term appointment ... The Panel further observed that [the] Appellant's third letter of appointment issued for a three-month extension ... granted by UNOPS and charged to its administrative budget, offered the Appellant, again, a 200 series [fixed-term appointment], with the same terms and conditions of employment as the two previous. The Panel therefore failed to see any evidence that the Appellant's contractual status had changed as a result of the three-month extension.
>
> 17. Furthermore, the Panel assumed that in the event that a change had occurred in the Appellant's contractual status as a result of the extension, he would have been offered a short-term contract with New York as place of recruitment, making him ineligible for any relocation grant, under the applicable Staff Rules and Regulations.
>
> ***Conclusions***
>
> 18. In light of the foregoing, the Panel concluded that there was no evidence that the Appellant's legal status had changed as a result of a three-month extension.
>
> 19. The Panel unanimously agreed that the Appellant had no legal basis to claim a relocation grant in the amount of US$ 12,000.
>
> ***Recommendation***
>
> 20. The Panel thus unanimously decided to make no recommendation in support of this appeal."

On 15 April 2003, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB in the "second case", filed the above-referenced Application with the Tribunal.

On 29 July 2003, the Under-Secretary-General for Management informed the Applicant that the Secretary-General agreed with the JAB's reasoning and conclusions in the "second case" and had decided to accept its unanimous recommendation and to take no further action on his appeal.

Whereas the Applicant's principal contentions in the "first case" are:

1. The Applicant had a legitimate expectancy that his JPO contract would be renewed for a third year.

2. The Applicant was the victim of a conspiracy to remove him from office and replace him with another JPO.

Whereas the Respondent's principal contentions in the "first case" are:

1. The Applicant was not given any expectancy of renewal of his contract.

2. The Applicant has not proved his allegations of a conspiracy to remove him from his post and to replace him with another employee.

Whereas the Applicant's principal contention in the "second case" is:

He was entitled to receive relocation grant at the single staff member rate of US$ 12,000, rather than the JPO rate of US$ 7,200.

Whereas the Respondent's principal contention in the "second case" is:

The change in the source of funding for the Applicant's contract did not bestow any particular rights to the Applicant and did not conflict with his status as a JPO.

The Tribunal, having deliberated from 29 October to 24 November 2004, now pronounces the following Judgement:

I. The Applicant has presented the Tribunal with two different cases: the "first case" concerns the non-renewal of his fixed-term contract; the "second case" concerns the relocation grant he received upon his separation from service. Whilst the Applications concern two different alleged wrongs arising from two different administrative decisions, the Tribunal has determined the cases to be sufficiently related to each other to be considered jointly. (See Judgement No. 1010, *Kanj* (2001).)

II. The Applicant joined UNOPS effective 5 November 1997 as a JPO with a one-year fixed-term contract under the 200 series of the Staff Rules. He was subsequently granted a one-year extension of his JPO contract, which expired on 4 November 1999. Thereafter, at his request, he received a contract for a period of three months, which ended on 4 February 2000. The Applicant was informed that his appointment had been extended for this final three-month period in a letter dated 13 January 2000. The same letter simultaneously informed him that UNDP would start his separation formalities.

As a JPO, the Applicant was funded by the Government of Italy. His final extension, however, was not under the auspices of the JPO scheme, but was a normal fixed-term contract paid by the Organization. It was made clear in that contract that it was granted under the same terms and conditions as his previous contracts.

III. In his "first case", the Applicant challenges the decision of the Administration not to further extend his JPO contract, despite the fact that the Government of Italy had agreed, on an exceptional basis, to pay for a third year. The Applicant's material contention is that he had a reasonable legal expectation that his JPO contract would indeed be extended for a third year.

The Tribunal notes first of all that, during his contractual period with the Organization, the Applicant received no indication whatsoever that his contract would be further renewed. During his second year as a JPO, or even during his final three-month contract, the Applicant received no letter or other express promise from the Administration that a third year of his JPO contract would be proposed. It is, apparently, normal practice that JPO staff members serve for periods up to two years. Correspondence exchanged between the Applicant's supervisor and the Chief, Division for Africa, in July and August 1999, i.e., prior to the expiration of the Applicant's JPO contract, makes it plain that the Organization did not want to examine the possibility of a further extension of his contract. In any event, that exchange of opinions was made between the competent authorities within the Organization and not with the Applicant, so even had the outcome been positive, he could not rely upon it in order to support a legal claim. Moreover, the Applicant was formally advised in January 2000 that his separation would take effect at the end of his current contract.

The Tribunal also takes note of an exchange of letters between the Organization and the Italian Government in March and April 2000 regarding whether Italy would be willing to fund a third year of the Applicant's JPO appointment. However, that exchange of letters, which again was completed at the bureaucratic level

and not with the Applicant (who, after all, had left office in February), ended with the decision of the Chief, Central Operations, Human Resources, UNDP, i.e., the official responsible for such decisions, who informed the Italian Government that the Organization no longer required the Applicant's services.

In Judgement No. 1057, *Da Silva* (2002), the Tribunal recalled its consistent jurisprudence

> "that fixed-term contracts do not carry any right of renewal and that no notice of termination is necessary in such cases. Exceptions to this rule may be found in countervailing circumstances, such as an express promise or an abuse of discretion including bias, prejudice or other discrimination against the staff member, or any extraneous or improper motivation on the part of the Administration. (See Judgements No. 205, *El-Naggar* (1975); No. 614, *Hunde* (1993); and No. 885, *Handelsman* (1998).)"

In the instant case, the Tribunal finds no indication that the Administration created any legal expectancy for the Applicant. The Tribunal wishes to emphasize that discussions held between the Administration and a Member State regarding the funding of a JPO post, or even actual agreement from the State in question to fund the post, do not create a legal right or expectancy to anyone aspiring to be a JPO. Such contracts are very specific, and the Administration must remain free to decide whether or not it wishes to have JPOs, or to employ a specific person among its JPOs. Again, this exchange of correspondence, regardless of its legal importance, took place after the Applicant had left the service of the Organization.

IV. The Tribunal turns now to the "second case", i.e., the decision of the Administration to pay the Applicant relocation grant at the JPO rate, rather than the rate applicable to single staff members under other forms of fixed-term contract. The Tribunal is surprised to see that the Applicant now relies upon the argument that he was not a JPO, whilst in his "first case" seeking damages for the fact that his JPO contract was not extended.

In Judgment No. 1195, *Newton* (2004) it was stated:

> "The Tribunal notes that employment within the United Nations is regulated by a series of regulations and rules, which have been drafted and are the result of long lasting policies; agreements with staff representatives; experience; and, the desire to create a well functioning environment. Unless it is shown that the Administration had the authority to, and indeed did, deviate from the

> Staff Regulations and Rules to the benefit of the employee, exceptions of this kind are presumed to have been due to mistake."

In the present case, there is not even a need for such a presumption to be applied as there was no mistake at all: the Administration correctly paid the Applicant at the JPO rate. The Tribunal notes that the final extension of the Applicant's appointment did not alter, under the circumstances, the terms and conditions of his initial letter or contract of appointment. Accordingly, notwithstanding the fact that he was given the functional title of "Associate Programme Officer" in his final letter of appointment, the Applicant remained under the terms and conditions of his initial JPO appointment, as clearly stated in his contract, and he has no legally founded claim to be considered otherwise. Therefore, this claim must also fail.

V. In view of the foregoing, both Applications are rejected in their entirety.

(*Signatures*)

Julio **Barboza**
President

Spyridon **Flogaitis**
Member

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary